70843-1

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No. 70843-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,

Plaintiff/Appellant,

v.

GURUNHAM SINGH KOCHAR, KAHSAI SIUM, CABDI NUUR CALASOW, DEEQ A. FARAH, MICHAEL B MEGNTA, GENENE DEMAMU, NIRMAL CHEEMA, PARMINDER SINGH CHEEMA, PARAMJIT SINGH DHALIWAL, SARWAN SINGH BAL, MUSTAFE HASSAN ISMAIL, HASSAN MOHAMED, DEJENE W. GEMECHU and SOLOMON MELLES,

Defendants/Respondents

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BRIEF OF APPELLANT SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION

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I. INTRODUCTION

The trial court erroneously decided to rescind contracts between Appellant Seattle-Tacoma International Taxi Association ("STITA") and the various Defendants, each of whom had signed a contract to join STITA as a "City/County" member. STITA requests that the trial court decision be reversed and remanded for the reasons set forth below.

STITA is a nonprofit taxi association which, until 2010, had been the longtime exclusive provider of outbound taxi services at Sea-Tac Airport under a contract with the Port of Seattle. In 2009, STITA decided to add 50 "dual licensed"[1] taxicabs to its fleet. The Defendants are all owner-operators of dual licensed cabs who entered into (essentially identical) contracts to join STITA, which contracts required the payment of a $20,000 initiation fee to STITA.

In the fall of 2009, the Port announced that the outbound taxi contract would be competitively bid rather than renewed to STITA through the previous procedure. STITA bid for the contract, but the Port decided to award it to Yellow Cab, a competing taxi association. STITA

[1] By law, a taxicab may only pick up passengers in a jurisdiction for which it is licensed, but may drop off anywhere. The terms "dual licensed" and "city/county" mean a taxicab that is licensed to operate in both the City of Seattle and the remainder of King County.

sued the Port and Yellow Cab to overturn that decision, but was ultimately not successful. After it became clear that Yellow had prevailed in the dispute, the Defendants all left STITA for Yellow Cab, without paying their entire $20,000 initiation fees.

STITA sued the Defendants in 2011 for payment of the unpaid balance of the initiation fees. The Defendants counterclaimed for rescission of the contract under a number of theories, generally arguing that STITA had lied to them by saying that STITA expected to have the Port contract renewed.

Judge Schapira of the King County Superior Court conducted a bench trial in November and December 2012, and untimely concluded that STTIA was liable for negligent misrepresentation. The trial court's apparent rationale was a finding that STITA had received information from the Port that the contract would be competitively bid, but did not adequately share that information with the Defendants—even though each of the contracts had a disclaimer that provided in part that "STITA makes no guaranty, promise or prediction as to whether the Port will allow City-County members to pick up passengers at Seattle-Tacoma International Airport."

The Court then granted rescission and required STITA to repay portions of the initiation fees that Defendants had paid, as well as certain other damages.

The trial court's decision rested on substantial legal errors. First, it is an element of negligent misrepresentation that the aggrieved party suffer damages. Washington caselaw further provides that only actual out-of-pocket loss, not lost profits, can constitute damages for negligent misrepresentation. But, during discovery and during the trial, Defendants failed to provide any evidence that they sustained net economic loss, because they refused to inform the Court what they earned while working for STITA. In fact, in response to a STITA's discovery request seeking documents pertaining to the Defendants' earnings, expenses and profits, the Defendants objected claiming that the request violated their right to "privacy."

Instead, at trial, the trial court allowed the Defendants cherry-pick certain expenses they incurred, but without explaining their entire financial condition. Without knowing for each defendant both what income they generated under the contract and what expenses they had, the court could not determine what their out of pocket net loss (if any) was. This failure of proof was pointed out to the trial court repeatedly during

the trial, leading finally to a statement by the trial court at the time of entry of judgment that "I'm not sure that the nature of out-of-pocket is the only description that one would give of an economic loss" for purposes of negligent misrepresentation.

As addressed below, the trial court misapplied the requirements to make out a case of negligent misrepresentation. As a matter of law, negligent misrepresentation requires as an element proof of out of pocket loss. But, Defendants' selective evidence of expenses, without a showing of offsetting income, was not sufficient to sustain a finding of out of pocket loss, a required element of negligent misrepresentation. In other words, Defendants failed in their burden of proving that each of them had suffered any net economic loss as a result of the alleged negligent misrepresentation, meaning the entire claim necessarily fails.

Second, under Washington law there is no generally actionable duty to disclose. Rather, nondisclosure of a material fact may form the basis for negligent misrepresentation only where there is a "special relationship," akin to a fiduciary relationship, between the parties. But the trial court made no finding of such a relationship, nor would the evidence support such a finding. Therefore, the trial court's finding of negligent misrepresentation by nondisclosure cannot stand.

Third, under Washington law an aggrieved party must "promptly" seek rescission upon learning of the facts underlying the claim. Here, the undisputed evidence is that the Port publicized the competitive bid in September 2009, and declared Yellow Cab the winner in December 2009. At that point, Defendants were indisputably on notice of any claims for misrepresentation regarding competitive bidding or STITA's chances of winning, but they did not promptly seek rescission. Rather, while the contract litigation was pending, Defendants stayed with STITA but put out feelers to Yellow Cab, so they would be able to join whichever association prevailed in the lawsuit. Even after Yellow Cab won, Defendants did not seek rescission. Rather, they waited until December 2012, nearly *two years* after being on notice, to assert a counterclaim for rescission. By failing to assert such a claim "promptly," Defendants waived it as a matter of law. The trial court decided to rescind the contracts anyway, even though that remedy was precluded under the case law.

Fourth, under the "independent duty doctrine" (previously known as the "economic loss rule"), a party cannot sue in tort for economic losses that are the subject of a contract. This case is on all fours with precedent stating that negligent misrepresentation is unavailable when the subject of

the alleged misrepresentation is governed by a contract—particularly when the contract itself assigns the risk of loss.

Fifth, the trial court also found STITA liable for unjust enrichment. But as a matter of law, unjust enrichment cannot be employed to rewrite the terms of an existing express contract. Because Defendants have no valid basis to rescind their contracts, unjust enrichment cannot come into play.

Sixth, and finally, the trial court erred in not granting judgment to STITA on its contract claims for the balance of the initiation fees. It is undisputed that Defendants signed the contracts, the payment terms are unambiguous, Defendants admit they did not pay the full $20,000, and, again, there is no basis to rescind the contracts. STITA is therefore entitled to judgment on its claim for the balance of the fees.

For all of these reasons, the trial court's ruling is erroneous. This Court should reverse the trial court and direct it to enter judgment on in favor of STITA.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by finding negligent misrepresentation in the absence of competent evidence of out-of-pocket loss by

Defendants.

2. The trial court erred by finding negligent misrepresentation on the basis of a failure to disclose in the absence of a "special relationship" between STITA and Defendants.

3. The trial court erred in granting the remedy of rescission, where it was not promptly sought by Defendants.

4. The trial court erred in failing to hold that the independent duty doctrine precluded tort claims for negligent misrepresentation, given that the contracts at issue addressed the risk.

5. The trial court erred in applying unjust enrichment in the face of a valid express contract.

6. The trial court erred in not entering judgment for STITA on its contract claim where Defendants have no valid defenses to payment.

III. STATEMENT OF THE CASE

A. Defendants' Contracts with STITA

STITA is a nonprofit taxi association that provides services to its members, independent taxicab owner-operators. *See* Verbatim Report of Proceedings ("VR") at Vol. 1, at 40:22-41:10. STITA was actually organized by the Port of Seattle in the late 1980s to coordinate dozens of independent cabs that were then serving Sea-Tac Airport, but in a disorganized fashion. *Id.; see also* CP 606. Before the events that are the subject of this dispute, STITA had for many years held the exclusive contract to provide outbound taxi serve at the Airport since its inception. CP 606. During that time, STITA had always had approximately 160 cabs, which were almost exclusively devoted to making one-way outbound trips from the Airport. *Id.*

In late 2008, STITA began the process of adding a fleet of 50 "dual-licensed" or "city/county" cabs to the association. *See* VR at Vol. 1, 44:3-13; CP606-607. STITA's Board decided on a number of rules for the addition. Each cab to be added would be owned by a pair of two owner-operators. Priority would be given to individuals who were affiliated with STITA as drivers of existing cabs, but did not own any STITA cabs

themselves. *See* VR at Vol. 1, 44:20-24; CP 609. A total of 29 of these "driver" partnerships were accepted by STITA, including all Defendants except Mr. Bal. *Id.* The remaining 21 slots were taken up by partnerships including at least one current STITA member-owner. (Mr. Bal is part of this second group.) *See CP* 610.

STITA prepared applications to be signed and submitted by each set of applicants. *See, e.g.,* Trial Ex.. 73.[2] The drivers all signed an initial application around January 2009, but later petitioned STITA to amend certain terms. *See* VR at Vol. 1, 45:9-46:3; Trial Ex. 66. This resulted in STITA issuing an "amended application," which all driver Defendants signed around March of 2009. *See* CP 90-120; 132-163. (This is the contract on which STITA's claims against the driver Defendants are based). In July 2009, the later wave of 21 member applicants signed an agreement that was, except for certain timing provisions, substantively identical to the amended driver applications. *See* CP 122-130.

While STITA hoped that the Port would eventually provide airport permits to these new members, all parties understood that was a decision reserved to the Port. Accordingly, the applications explained that the

[2] Documents referenced as "trial exhibits" in this brief are part of a supplemental designation of clerk's papers being filed herewith by STITA.

City/County members would work other routes in Seattle and King County until such time as the Port might grant permits. *See, e.g.,* CP 109. Crucially, all of the applications continued the following disclaimer, on the last page of the application a few lines above the signature line:

> STITA City-County members may not pick up passengers at the Airport unless the Port of Seattle invites them to do so. ***STITA makes no guaranty, promise or prediction*** as to whether the Port will allow City-County members to pick up passengers at Seattle-Tacoma International Airport.

See, e.g., CP 111. Documents from the Defendants' internal discussions confirm that the Defendants understood the import of this disclaimer:

> 3 - Right –now; **STITA <u>can not guarantee</u> us if port of seattle allow us to pick up from the airport or not,** but if the P.O.S. aliow [sic] us to join STITA, how are we going to be treated by STITA?
>
> . . .
>
> 3 # B – Are we going to have equal and full right with existing STITA members to work any where and any time we want, **<u>If</u> we are accepted** by *Port of Seattle*?

Trial Ex. 63 (boldface and underline added; italics in original).

The applications provided that the City/County members were obligated to pay an initiation fee of $20,000, payable in four periodic installments. *See, e.g.,* CP 110. It is undisputed that Defendant Bal's partnership paid $5,000 in initiation fees, while the other Defendants'

partnerships each paid $10,000. CP 417-418.

In the months between when they joined STITA and when they eventually left, the Defendants operated their cabs on non-Airport routes in Seattle and King County as set forth in the applications. In addition, Defendants were periodically able to pick up at the Airport during peak periods when the Port allowed additional cabs in. *See* Trial Ex. 36; Trial Ex. 121. As detailed below, however, not a single defendant produced information in discovery or at trial on how much they earned from fares while driving for STITA.

B. The Airport Contract Award

In 2008, Stacy Mattson, a Port of Seattle staff member, met with STITA's board and membership. CP 606. The trial court apparently found that, at this meeting, Ms. Mattson told STITA that the contract would be competitively bid when it next came up for renewal. *Id.*[3]

In September 2009, the Port of Seattle released its request for Proposals ("RFP") to taxi associations. CP 610. STITA prepared a

[3] Though it is not germane to STTIA's assignments of error, STITA vigorously disputes this finding and contends that Ms. Mattson only gave STITA very general feedback that the 2009 contract renewal might be different than past ones. In fact, the Port only firmed up its plan to bid the contract via RFP in the summer of 2009, after the driver Defendants had signed their contracts. Defendants did not procure the testimony of Ms. Mattson or any other Port witness at the trial.

response to the RFP, as did a number of other associations. In December 2009, the Port staff recommended that Yellow Cab receive the contract. CP 611. At an open public meeting on December 15, 2009 (attended by Defendant Ismail and possibly other Defendants), the Port Commission voted to formally award the contract to Yellow Cab.

STITA convened an all-hands meeting in January 2010 to discuss its response to the contract award. Many if not all Defendants attended that meeting, as did Defendants' attorney, Mr. Sium (whose father is one of the Defendants). STITA decided to file a lawsuit against the Port and Yellow Cab to contest the award, and appointed a committee to oversee that litigation, which included Defendant Ismail as a member. CP 379-380.

Despite knowing that the Port of Seattle had put the contract up for competitive bidding, and knowing that STITA had not been selected, not a single Defendant demanded rescission or even left STITA at this point. On the contrary, Defendants testified that they continued driving with STITA during this period, but put out feelers to Yellow Cab as well.[4] *See* VR, Vol. 2 at 21:19-24. Their intention in doing so was clearly to wait

[4] Defendants testified that drivers who had not formerly been affiliated with Yellow Cab had to get on a waiting list, but previous Yellow drivers would be re-admitted without the waiting list.

and see which party won the litigation, and then drive for that association at the Airport.

STITA's suit to enjoin the contact award came to an end in August 2010, and the Port and Yellow Cab signed the contract the day after the lawsuit was dismissed. CP 612. Under that contract, Yellow Cab would take over as the exclusive taxi provider at the Airport on November 1, 2010. *Id.* Once the outcome of the litigation was known, almost all of the City/County drivers, including all of the Defendants, left STITA and signed up with Yellow Cab. CP 613. Even then, no Defendant filed a lawsuit seeking rescission.

C. Procedural History

STITA filed this lawsuit in June 2011 against fourteen defendants (comprising seven sets of City/County partners). *See* CP 1-7. STITA's only claim was for damages for breach of contract – specifically, payment of the unpaid balance of each partnership's $20,000 initiation fee. *Id.*

Defendants filed their first answer on July 5, 2011. CP 8-21. That answer asserted various counterclaims and affirmative defenses, including negligent misrepresentation and unjust enrichment. *Id.* However, the answer did not request rescission as a remedy, only money damages. CP 19.

Defendants filed an amended answer in November 2011. CP 22-38. That pleading too did not contain any prayer for rescission.

Defendants amended their answers yet again in December 2011. CP 39-59. These second amended answers, which are the operative pleadings for the remainder of the case,[5] were the first to request rescission of the contracts—almost exactly two years after the supposed basis for the misrepresentation claim came to light.

STITA moved for summary judgment in the spring of 2012. CP 59-83. Judge Barnett[6] granted the motion in part, dismissing several of Defendants' theories. CP 292-294. However, the trial court declined to dismiss the counts for fraud in the inducement, negligent misrepresentation, and unjust enrichment. *Id.* STITA moved for discretionary review but Commissioner Neel ruled that review was not warranted. *See* Case No. 68702-6-I.

STITA served identical interrogatories and requests for production

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[5] Defendant Parminder Cheema was represented by separate counsel, and filed a separate but identical answer to the other Defendants. CP 49-59. Defendants subsequently moved several times to amend their answers, but never actually filed the amended versions. In any event, this allegation was unchanged in the later amendments.

[6] This case had been assigned to a number of judges: Judges Barnett, Inveen and Ramseyer heard various pretrial motions. Judge Schapira was assigned to the case immediately before trial and has presided since.

on each defendant. *See, e.g.,* CP 412-416. Most notably, STITA's Request for Production No. 14 requested: "Please produce all documents relating to your earnings, expenses and profits as a taxicab owner and/or driver while you were affiliated with STITA." CP 416. Defendants all objected to this request, citing a "right to privacy" under *Griswold vs. Connecticut,* the U.S. Supreme Court case that established a constitutional right to use contraception—which Defendants somehow construed as precluding the disclosure of relevant business information. *Id.* Not a single Defendant produced any documents pertaining to earnings, expenses or profits.[7] In fact many of the Defendants produced no documents at all in response to any of STITA's requests.

STITA also noted depositions for each Defendant. *See* CP 394. However, their attorney, Mr. Sium represented that all of his clients (*i.e.*, all Defendants except for Parminder Cheema) required interpreters, and refused to provide the witnesses unless STITA paid for those interpreters. *Id.* When STITA refused to agree to that arrangement, Mr. Sium moved to quash the deposition notices. CP 295-365. STITA opposed that motion, providing evidence that all of the Defendants read and wrote English—for example, as a part of their for-hire driver license

[7] One Defendant produced one receipt for one registration fee during trial.

examinations. CP 366-391. Judge Inveen agreed with STITA that Defendants had failed to establish a need for interpreters, denied the motion to quash, and sanctioned Mr. Sium for bringing the motion. CP 392-394. Most of the Defendants ultimately testified in English during the trial, rather than footing the bill for interpreters themselves, proving that Mr. Sium's obstructionist tactics were baseless.

As part of its motions in limine, STITA moved to exclude evidence from Defendants as to their financial condition while at STITA, in light of their refusal to produce documents attesting to their earnings. CP 396-398. Judge Schapira orally ruled that, except for certain expenses such as licensing fees that were commonly known, Defendants would be precluded from introducing damages evidence unless it had been disclosed earlier in the case. VR at Vol. 1, 10:15-16 ("If it doesn't appear anywhere, then I will exclude it."). The trial court specifically stated that this would extend to evidence on earnings:

> THE COURT: The problem is, that may be very hard to prove where somebody doesn't say, here's what I could have earned; here's what I did earn once I left STITA; or, you know, whatever. If it's not in the case, it doesn't get to come into the case.

VR at Vol. 1, 12:7-8.

At trial, each of the Defendants testified more or less identically

that they supposedly did not know the Airport contract would be released for bid, that STITA did not tell them that (despite the contract warning), and that they would not have signed the applications had they known that. *See* CP 607. Each Defendant also claimed to have incurred certain costs in joining STITA and later joining Yellow Cab. *See* CP 615-617. Some Defendants stated that, because STITA's routes were less busy, they were unable to lease their cabs at night to other drivers, resulting in a decrease in one form of income. CP 616-617. Judge Schapira did not award damages for this allegedly foregone income, however, apparently finding that it was not sufficiently documented. CP 622. Crucially, no Defendants offered any testimony or documents as to their net earnings (*i.e.*, fare revenues minus expenses) while with STITA.

The trial concluded in late December 2012. Almost four months later, on April 15, 2013, the trial court issued its Findings of Fact and Conclusions of Law ("Findings"). CP 508-528. The trial court found that STITA had committed negligent misrepresentation by failing to disclose the alleged information from Ms. Mattson that the Airport contract would be released for public bid. CP 521-523. The trialourt also found unjust enrichment to apply. CP 523. However, the court found insufficient evidence for Defendants' fraud and "contract of adhesion" (*i.e.*,

unconscionability) claims. CP 521 and 523. As a remedy, the court ordered the contracts rescinded, and awarded Defendants various amounts of damages, including for the initiation fees they paid and various licensing fees paid when they changed taxi associations. CP 524-527. However, as noted above, the trial court did not find that Defendants had proven any lost earnings. *See* CP 525 (denying damages for alleged lost night lease income).

STITA moved to amend the Findings, arguing a number of issues including the errors presented here.[8] CP 529-583. At a hearing on May 31, 2013, Judge Schapira stated that she would not revise the findings in any respect. During that hearing, Judge Schapira agreed that Defendants had not presented sufficient evidence of out of pocket loss, but said that she did not believe such evidence to be legally necessary:

> MR. GOLDFARB: So I think what I hear Your Honor saying is that as you read the cases and apply the law in this case, ***you don't think that showing out-of-pocket loss is a requirement.***
>
> THE COURT: Well, out of -- ***I'll say yes to that*** just so that we can finish this up. Again, loss is required. I'm not sure that the nature of out-of-pocket is the only description that one would give of an economic loss.

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[8] STITA first moved to vacate the original Findings because the Court had no provided a preliminary draft for the parties review, as required by CR 52(c). The Court agreed to vacate the Findings pending STITA's motion to amend.

VR at Vol. 3, 36:16-24 (emphasis added).

Instead, during that same hearing, Judge Schapira articulated what was an expectation model of damages, repeatedly using the word "opportunity" to describe the expectation of additional earnings that Defendants expected from at STITA but did not ultimately get:

> What was different is the opportunity to spend $20,000 to be -- to have your cab worth more and to be an owner and to be a member. And that -- that that has value.
>
> And based on that, that when you don't receive that, you have been damaged, even though it at the end of the month you may have earned "X" amount more than you expended.

VR at Vol. 3, 38:23 – 39:5.

The Court subsequently granted Defendants' motion for attorney's fees under the small claims fee statute, RCW 4.84.250 et seq.

STITA timely filed a Notice of Appeal. CP 629-631. Defendants did not cross-appeal within the allotted time.

IV. ARGUMENT

A. Standard of Review

The trial court's findings of fact are reviewed for "substantial evidence." *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726,

731, 853 P.2d 913, 916 (1993). Questions of law, however, are reviewed de novo. *Williamson, Inc. v. Calibre Homes, Inc.,* 147 Wn.2d 394, 398, 54 P.3d 1186, 1188 (2002). The application of law to a particular set of facts is also reviewed de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404, 406 (2001).

B. The Trial Court Erred by Finding Negligent Misrepresentation Without Evidence of Out-Of-Pocket Loss by Defendants.

The Court's finding of negligent misrepresentation is erroneous because it was not supported by competed evidence of out-of-pocket pecuniary loss. Without such evidence, Defendants cannot show that they suffered "damage," and without damage there is no tort. Three points of law underlie this conclusion.

First, damages are one of the necessary elements of negligent misrepresentation. *Ross v. Kirner*, 162 Wn. 2d 493, 499, 172 P.3d 701, 704 (2007).[9] In other words, if a claimant cannot show that damage occurred, there is no liability for negligent misrepresentation at all. *Id.; see also Edwards Contracting Co., Inc. v. Port of Tacoma*, 7 Wn. App. 883, 888, 503 P.2d 1133, 1137 (1972) *aff'd* 83 Wn.2d 7, 514 P.2d 1381

[9] Further, all elements of negligent misrepresentation must be proved by clear and convincing evidence. *Ross*, 162 Wn. At 493.

(1973). ("Uncertainty as to the nature, existence or cause of damage is fatal" to recovery).

Second, under Washington law, the only form of economic damage that is cognizable as damage under a negligent misrepresentation theory is actual, out-of-pocket loss – not the lost expectation of profit. *Janda v. Brier Realty*, 97 Wn. App. 45, 51, 984 P.2d 412, 415 (1999) ("The Restatement, adopted in Washington, does not permit Janda to recover, as he seeks to do, the greater profit he claims he would have realized had Young properly represented the cost of subdividing the two properties."). The Restatement of Torts explains the rationale for this rule:

> When the harm that is caused is only pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it.
>
> The liability stated in this Section is likewise more restricted than that for fraudulent misrepresentation stated in § 531. When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.

Restatement (Second) of Torts, § 552 cmt. a (1977).[10]

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[10] Washington follows Section 552 of the Restatement. *See, e.g., Janda*, 97 Wn. App. at 50.

Third, when courts assess whether damage has been sustained, they must examine the benefits as well as the harms occasioned by the transaction at issue. For example, in the *Family Medical Building* case, Division 3 of this Court found that the trial court's instruction on damages was erroneous because it did not require the jury to consider the benefits as well as the expenses the plaintiff incurred through the contract at issue:

> Here, FMB made expenditures in building the addition which it would not have made but for the State's representations. Hence, those expenditures were part of FMB's damages and were properly admitted. Nevertheless, the addition benefits FMB by the rental income it produces. The court's instruction did not advise the jury to consider this benefit as an offset to FMB's damages. The State's exception to the instruction to the effect that damages should be measured by the benefit conferred on the defendant rather than the costs incurred by the plaintiff was sufficient to advise the Superior Court of its error.

Family Med. Bldg., Inc. v. State, Dept. of Soc. & Health Services, 37 Wn. App. 662, 674, 684 P.2d 77, 85 (1984) *aff'd and remanded*, 104 Wash. 2d 105, 702 P.2d 459 (1985).

Combining these three concepts, to demonstrate the necessary damages element of negligent misrepresentation, Defendants were required to show, through clear and convincing evidence, that they suffered a *net* out-of-pocket loss as a result of their contract with STTITA. Any failure to do so is fatal to their claim.

But at trial, Defendants wholly failed to provide competent evidence of their net financial condition while at STITA, because they only offered testimony as to cherry-picked expenses like their initiation fees and re-licensing costs. If Defendants had made enough in fares to offset those expenses—even if it was less than they had hoped to make on the Airport route—there can be no claim for negligent misrepresentation. Since Defendants raised not a shred of evidence as to what they earned at STITA, there was no way for the court to find that net out-of-pocket loss existed. That failure of proof dooms Defendants' claims.

At the hearing on STITA's motion to amend the Court's Findings, Judge Schapira essentially admitted that such evidence was lacking, but stated her belief that it was not necessary:

> MR. GOLDFARB: So I think what I hear Your Honor saying is that as you read the cases and apply the law in this case, ***you don't think that showing out-of-pocket loss is a requirement.***
>
> THE COURT: Well, out of -- ***I'll say yes to that*** just so that we can finish this up. Again, loss is required. I'm not sure that the nature of out-of-pocket is the only description that one would give of an economic loss.

VR at Vol. 3, 36:16-24 (emphasis added).

As noted above, Judge Schapira explained that, in her mind, damages were established because Defendants did not get the "opportunity" they were expecting:

> What was different is the opportunity to spend $20,000 to be -- to have your cab worth more and to be an owner and to be a member. And that -- that that has value.
>
> And based on that, that when you don't receive that, you have been damaged, even though it at the end of the month you may have earned "X" amount more than you expended.

VR at Vol. 3, 38:23 – 39:5. Similarly, in the Findings of Fact, the trial court stated that the Defendants "suffered financial ***expectation*** losses because dispatch services were inadequate to support night lease." CP 617 (emphasis added). That is the epitome of what, under the *Janda* case, the court cannot award for negligent misrepresentation—the lost expectation of profits.

Thus, the trial court erred by applying an expectation damages test to find that that the damages element of negligent misrepresentation was satisfied. Under the correct law, Defendants were required to demonstrate actual out-of-pocket damages to prevail on this claim. They failed to do so, because it is impossible to calculate actual out-of-pocket loss without any information regarding Defendants' earnings. Since Defendants failed

to provide an essential element of their case, the trial court's ruling on negligent misrepresentation must be reversed.

C. The Court Erred in Finding Negligent Misrepresentation Where STITA Owed no Duty to Disclose.

Next, the basis for the trial court's misrepresentation finding was that STITA had received information from the Port of Seattle that the Airport contract would go to competitive bid, but did not share that information from the Defendants. But the trial court did not find, either factual or legally, that STITA owed a duty to disclose, which might make that alleged omission actionable. On this basis as well, the trial court's ruling must be reversed.

Recent caselaw holds that "[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation." *Ross,* 162 Wn.2d at 499. That alone again dooms Defendants' theory.

Even assuming that general rule does not apply, Defendants' theory would still only be actionable if STITA were under a duty to disclose the information. "The existence of a duty is a question of law." *Colonial Imports, 1*21 Wn.2d at 731. And the rule as to a duty to disclose is crystal-clear: "some type of special relationship must exist before the

duty will arise." *Id.* at 732.[11] The standard for a "special relationship" is similar, though not identical, to that of a fiduciary relationship. *See id.*

For example, a special relationship might arise if the speaker was a trusted friend of the claimant, or was a professional advisor such as an accountant. But there is no finding of fact that might support a claim of special relationship here. Nor would there be sufficient evidence to sustain such a finding as this was an arm's length business transaction.

Cognizant of this rule, some Defendants attempted to testify that they placed a high degree of trust in STITA management. However, many of the Defendants had never been affiliated with STITA at all before joining the City/County program. And those Defendants who were previously with STITA testified as to an adversarial relationship, where STITA's board "abused" the drivers, and the drivers submitted anonymous complaints to taxi regulators. *See* CP 606. STITA disputes the basis for those claims, but for these purposes, they are an admission that no "special relationship" existed between STITA and the Defendants.

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[11] *Colonial Imports* quotes the following from the Restatement (Second) of Torts, § 551(1) (1977): "One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, *but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question*." (emphasis added)

Defendants also argued before the trial court that STITA was under some "good faith" duty to disclose all facts that the Defendants might find material, even in the absence of a special relationship. Defendants relied principally on *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980). To the extent Defendants read that case as implying such a broad duty, it cannot be reconciled with the later *Colonial Imports* case, which squarely holds that there is *not* a duty to disclose in the absence of a special relationship.

Indeed, a closer examination of *Liebergesell* shows that its holding is much more circumscribed than Defendants claim. The case involved a particularly galling set of facts that bear no relation to those in the present case. There, the parties were friends, and the defendant asked the plaintiff to invest in his business. 93 Wn.2d at 884. The defendant, however, drew up the investment as a series of loans at various interest rates up to 36%, making many of the loans illegal under Washington usury law. *Id.* at 884-85. Then, the defendant threatened to sue the plaintiff for usury unless the plaintiff accepted a lower return than was bargained for, despite the fact that the defendant himself had written up the contract so as to be illegal. *Id.* at 885-86.

In analyzing the case, the State Supreme Court began with the general rule that in "a business transaction deal at arm's length... an individual has no particular duty to disclose facts nor any particular right to rely on the statements of the party with whom he contracts at arm's length." *Id. at* 889. However, the court noted that that parties' duty of good faith may sometimes implicate a duty to disclose, "[i]f in the exercise of good faith the defendants should have revealed to Mrs. Liebergesell the illegality of the proposed loans, they breached a contractual duty of fair dealing which would prevent them from asserting the usury defense." *Id.* at 894.

That holding was based on demonstrably different facts— the Court found that a friend and business advisor intentionally wrote up illegal contracts in order to frustrate the innocent party's ability to obtain the bargained-for consideration. There is simply no applicability to the facts here, where (1) STITA was not in a fiduciary-type relationship with Defendants, and (2) STITA did not engineer the situation that to frustrate the Defendants' rights under the contract.[12] But Defendants read

[12] The Court rejected Defendants' claims for intentional fraud. CP 618. Nor is there even an allegation that STITA meant for the enterprise to fail. Rather, it is undisputed retaining the airport contract was STITA's top priority. *See* CP 606

Liebergesell to imply a duty of good faith that forces disclosure of all potential material facts. If that was ever the law (it was not, as the case's plain statement of the general rule indicates), it is most certainly not the law now under *Colonial Imports.*

Thus, since there is no basis to find STITA was under a duty to disclose, the Court's finding of negligent misrepresentation based on an omission must be reversed.

D. The Court Erred in Granting Rescission Where Defendants Did Not Seek it Promptly

The trial court also erred by granting a remedy of rescission. Based on the undisputed evidence at trial, Defendants learned of the facts necessary for their misrepresentation claim no later than December 2009, when the Port awarded the contract to Yellow Cab, but waited approximately two years to bring a claim for rescission. That was not prompt, and precludes the remedy.

It is black letter law that "rescission of an agreement once made *must be prompt* upon discovery of the facts warranting such an action." *Clover Park Sch. Dist. No. 400 v. Consol. Dairy Products Co.*, 15 Wn. App. 429, 434, 550 P.2d 47, 50 (1976) (emphasis added). "If a claimant continues to receive

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("STITA's main purpose was to maintain and renew its exclusive license at the airport").

benefits under the contract after he has become aware of the fraud… he will be deemed to have affirmed the contract and waived his right to rescind." *Power v. Esarey*, 37 Wn. 2d 407, 224 P.2d 323 (1950).

Perhaps most importantly, the innocent party "may not wait to see whether the contract turns out to be profitable or unprofitable, good or bad," before seeking rescission. *B. C. Richter Contracting Co. v. Cont'l Cas. Co.*, 230 Cal. App. 2d 491, 500, 41 Cal. Rptr. 98, 104 (1964); *see also Watson v. Fantus*, 275 Or. 605, 610, 552 P.2d 251, 253-54 (1976) ("Plaintiff himself testified that at least part of the reason for the delay was that he was waiting to see whether he made a profit during the intervening period of time. Under these circumstances, we do not believe that plaintiff acted with reasonable promptness, and we conclude that he is not entitled to a rescission of his contract.").

Finally, this rule also requires prompt *suit* to rescind, not merely a prompt request for return of the initiation fees or prompt disassociation from STITA (neither of which occurred promptly in any event). See *Darnell v. Noel*, 34 Wn. 2d 428, 435, 208 P.2d 1194, 1197 (1949) ("It is a well-settled rule that actions for rescission must be promptly *commenced*.") (emphasis added).

Here, the trial court's finding of misrepresentation was based *only* on STITA's alleged failure to inform the Defendants that contract would be put up to public bid rather than automatically renewed to STITA. The Defendants unquestionably learned about the public bidding no later than December 2009, when the Port of Seattle announced that Yellow Cab had won the bidding. *See* CP 611.

But the Defendants did not seek rescission at this point. Rather, the Defendants admitted that they continued with STITA while STITA's lawsuit to overturn the contract was pending, but, if necessary, got on the Yellow Cab's waiting list so that they could switch if Yellow retained the contract. *See* VR, Vol. 2 at 21:19-24. In the meantime, Defendants continued to accept the benefits of their contract with STITA, such as STITA's dispatch services and the right to drive as a STITA-affiliated and liveried vehicle.[13]

In other words, even after knowing about what they allege was a misrepresentation, Defendants held off on rescission until they found out whether STITA would win the Airport lawsuit and contract—i.e., whether the

[13] Under applicable law, taxicabs must affiliate with a qualifying association, and bear that association's livery, in order to operate. *See, e.g,.* SMC 6.310.130; SMC 6.310.200.

STITA contract would be favorable or not.[14] While that might have been a savvy business move, it comes with a legal cost—waiver of rescission.

Yet, even after they left STITA and joined Yellow Cab (almost a year after the bid result was announced), Defendants still did not demand rescission. Moreover, Defendants did not even plead rescission in their first *or second* answers—only in their third version of their answer, about two years after the bid announcement. *See* CP 39-59. Needless to say, that is not "prompt."

Defendants were on notice of their claim in December 2009. They waited to see whether the STITA contract would end up being advantageous before doing anything, and even then waited yet another year before actually filing a rescission claim. As a matter of law, this was not "prompt" and precludes the remedy of rescission.

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[14] To use a football analogy, when an "offsides" penalty is called on the defense before a play, the offense can either accept the penalty and re-do that play, or decline the penalty and accept the results of the play. This is commonly known as a "free play" because the offense can try for a huge gain, knowing that they can accept the penalty if the play fails—a win-win situation. Defendants were essentially treating the STTIA situation as a "free play," which the law does not permit

E. The Independent Duty Doctrine Precludes a Negligent Misrepresentation

The "independent duty doctrine," formerly known as the economic loss rule, precludes a party from asserting tort remedies for economic loss unless the defendant violated an independent tort duty. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). Thus, where "a plaintiff's alleged harm is nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise." *Id.* In particular, courts refuse to apply tort remedies where the parties "expressly allocate a particular risk" by contract, or could have done so. *Alejandre v. Bull*, 159 Wn.2d 674, 688, 153 P.3d 864, 871 (2007); *see also Donatelli v. D.R. Strong Consulting Engineers, Inc.*, ___ Wn.2d ___, 312 P.3d 620, 627 (Nov. 14, 2013) (reaffirming caselaw finding that disclaimer provisions in contracts precluded negligent misrepresentation claims).

The Supreme Court has modified its articulation of the doctrine since *Alejandre*, and has explained that the existence of a duty not to commit negligent representation should be determined on a case-by-case basis. *See Donatelli,* 312 P. 3d 620. However, *Alejandre* is still good law for its particular fact pattern, and the present matter is on all fours with it.

See Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 450 n. 3, 243 P.3d 521, 526 (2010) (transition to independent duty doctrine "leave[s] intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances."); *Donatelli*, 312 P.3d at 627 (discussing *Alejandre* with approval). Just like *Alejandre*, the tort alleged in this case is negligent misrepresentation. Just like *Alejandre*, there the contract expressly allocated the risk that the Defendants might not be able to drive at the airport. Each and every one of the contracts at issue contained the following disclaimer:

> STITA City-County members may not pick up passengers at the Airport unless the Port of Seattle invites them to do so. ***STITA makes no guaranty, promise or prediction*** as to whether the Port will allow City-County members to pick up passengers at Seattle-Tacoma International Airport.

See, e.g., CP 111 (emphasis added). The provision could not be clearer: the risk that the City/County members would not be able to drive at the airport was assigned by contract to the drivers. A finding of negligent misrepresentation on the same issue would, as the *Alejandre* court warned against, rewrite the contracts into a bargain the parties did not make.

Defendants argued (and the trial court apparently agreed) that the disclaimer does not apply here, because it does not discuss guarantees as to whether STITA would renew the contract. But the injury that

Defendants complain about is that they were not able to get the lucrative airport business. And the disclaimer cited above assigns the risk of that outcome to Defendants, whether the reason was that STITA did not get the contract, the Port did not issue licenses to particular Defendants, or any other contingency.[15]

Thus, under well-established precedent, Defendants' claims involve a risk that was allocated by contract, and there is no independent duty on which Defendants can base their claims. The independent duty doctrine therefore precludes recovery for negligent misrepresentation. *See Alejandre*, 159 Wn.2d at 689 ("Alejandres' negligent misrepresentation tort claim is precluded under the economic loss rule for the reasons explained above.").

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[15] An analogy may be helpful. Suppose a car was sold under a contract stating that the sale was as-is and that the seller made no warranty as to whether the car was drivable. The buyer would be precluded from claiming negligent misrepresentation as to any problem that rendered the car non-drivable, because that was the risk allocated by contract. It would not matter whether the underlying problem with the car was with the engine, transmission, or any other component. Here too, the disclaimer does not limit itself to only one particular reason for why the City/County members might not be able to pick up at the Airport, so the Defendants cannot argue around it by implying limitations that do not exist.

F. The Court Erred in Applying Unjust Enrichment

The Court also found that Defendants were entitled to damages under the principle of unjust enrichment. But for the reasons stated above, the Court committed error in rescinding the contracts based on a finding of negligent misrepresentation. Because those contracts cannot be rescinded, and unjust enrichment cannot be applied to rewrite the terms of an existing contract, the Court's unjust enrichment finding fails as well.

It is well-established that "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97, 103 (1943). Therefore, "a party to an express contract may not bring an action under a theory of an implied contract relating to the same matter." *Ehreth v. Capital One Servs., Inc.*, C08-0258RSL, 2008 WL 3891270, at *3 (W.D. Wash. Aug. 19, 2008) (citing *Chandler*); *see also Peterson v. Kitsap Cmty. Fed. Credit Union*, 171 Wn. App. 404, 430, 287 P.3d 27, 39 (2012) ("Peterson's unjust enrichment claim fails because (1) it relates to the same subject matter as her express contractual obligation to pay a 'reconveyance fee' under Covenant 18 of her Deed of Trust, and (2) she has not argued that a

specific component of the "Release Fee (Reconveyance)" was an unearned and extra-contractual fee.").[16]

In her ruling on STITA's motion for discretionary review, Commissioner Neel recognized the principle that unjust enrichment may not contravene an express contract, but did not find obvious error because "there are genuine issues of fact regarding whether the contract is voidable." *See* Case No. 68702-6-I. But the Court ultimately found only one reason to void the contracts—negligent misrepresentation—and for the reasons stated above, that finding was erroneous. The result is that there is no basis to void the contracts, which in turns means that the contracts are valid and the court cannot apply unjust enrichment to draw up a different bargain than the one the parties agreed to make.

[16] Here, there is no argument that the "unjust enrichment" finding is somehow beyond the scope of the contracts. Defendants' agreements specified that Defendants were required to pay the initiation fees, and made no suggestion that STITA would be liable for any of Defendants' expenses in the event that STITA did not win the Airport contract. On the contrary, the agreements stated that STITA made no "guarantee" of Airport access.

G. The Court Erred in Not Entering Judgment for STITA on its Contract Claim

STITA was the plaintiff in this lawsuit, having brought claims for breach of contract against each pair of Defendants for the unpaid balance of the initiation fees. The prima facie elements of STITA's contract claims are undisputed. Defendants admit that they signed the contracts, and admit what portion of the initiation fees they all paid (in all cases, less than the required $20,000). The initiation fee provision is clear and unambiguous—payment of the full $20,000 was required. *See Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253, 1257 (2006) ("Interpretation of an unambiguous contract is a question of law").

Defendants raised a number of counterclaims and affirmative defenses to payment, but the Court only found for them on two claims: negligent misrepresentation and unjust enrichment.[17] For the reasons set forth above, both findings were in error. Since this Court is faced with a set of valid, express contracts that Defendants did not fully perform, there is no remaining question of fact. Defendants are in breach by their failure

[17] The unsuccessful defenses included fraud, the Consumer Protection Act, waiver, estoppel, and "contract of adhesion" (understood to mean unconscionability).

to pay the entire initiation fees, and STITA is entitled to damages for that breach.

Therefore, in addition to reversing the negligent misrepresentation and unjust enrichment findings, this Court should remand and instruct the trial court to enter judgment in favor of STITA on its contract claims.

V. CONCLUSION

The trial court's findings against STITA were grounded on a number of clear errors of law and cannot be sustained under the correct legal analysis. This Court should reverse, and should direct the trial court to enter judgment in STITA's favor.

RESPECTFULLY SUBMITTED this 7th day of February, 2014.

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DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury, under the laws of the State of Washington, that on February 7, 2014, I caused the service of the foregoing pleadings on each and every attorney of records herein:

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